

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

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In re: :  
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THE FINANCIAL OVERSIGHT AND : PROMESA  
MANAGEMENT BOARD FOR PUERTO RICO, : Title III  
:  
as representative of : Case No. 17-BK-3283 (LTS)  
:  
THE COMMONWEALTH OF PUERTO RICO *et al.*, : (Jointly Administered)  
:  
Debtors.<sup>1</sup> :  
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In re: :  
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THE FINANCIAL OVERSIGHT AND : PROMESA  
MANAGEMENT BOARD FOR PUERTO RICO, : Title III  
:  
as representative of : Case No. 17-BK-4780 (LTS)  
:  
PUERTO RICO ELECTRIC POWER AUTHORITY :  
:  
Debtor. :  
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**NOTICE OF APPEAL OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS  
FROM ORDER DENYING MOTION TO TERMINATE RULE 9019 MOTION**

Notice is hereby given that the Official Committee of Unsecured Creditors (the  
“Committee”)<sup>2</sup> hereby appeals to the United States Court of Appeals for the First Circuit from

<sup>1</sup> The Debtors in these Title III Cases, along with each Debtor’s respective Title III case number and the last four (4) digits of each Debtor’s federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17-BK-3283- LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (“COFINA”) (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (“HTA”) (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico (“ERS”) (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority (“PREPA”) (Bankruptcy Case No. 17- BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority (“PBA”) (Bankruptcy Case No. 19-BK-5233-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

the Order Denying the Official Committee of Unsecured Creditors' Motion to Terminate Rule 9019 Motion, entered by the United States District Court for the District of Puerto Rico on November 4, 2020 [Docket No. 15020 in Case No. 17-3283 and Docket Entry No. 2287 in Case No. 17-4780], and from all prior, interlocutory rulings merged into that order, including the Memorandum Order Regarding Official Committee of Unsecured Creditors' Urgent Objection to Magistrate Judge's September 5, 2020 Order on Motion to Compel Discovery in Connection with Motion to Terminate Bankruptcy Rule 9019 Motion, entered by the District Court on October 15, 2020 [Docket No. 14586 in Case No. 17-3283 and Docket Entry No. 2252 in Case No. 17-4780], and the Order on Motion to Compel, entered by the Magistrate Judge on September 5, 2020 [Docket Entry No. 14181 in Case No. 17-3283 and Docket Entry No. 2177 in Case No. 17-4780]. Copies of the orders being appealed are attached.

The other parties to this matter and their respective attorneys are as follows:

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Dated: December 4, 2020

By: /s/ Luc A. Despins

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**ATTACHMENTS**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

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In re:

PROMESA  
Title III

THE FINANCIAL OVERSIGHT AND  
MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

No. 17 BK 3283-LTS

THE COMMONWEALTH OF PUERTO RICO,  
et al.,

(Jointly Administered)

Debtors.<sup>1</sup>  
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In re:

THE FINANCIAL OVERSIGHT AND  
MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

No. 17 BK 4780-LTS

PUERTO RICO ELECTRIC POWER AUTHORITY,

Debtor.  
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ORDER DENYING THE OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS' MOTION TO TERMINATE RULE 9019 MOTION

Before this Court is the *Motion of Official Committee of Unsecured Creditors to Terminate Bankruptcy Rule 9019 Motion* (Docket Entry No. 14056 in Case No. 17-3283 and

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<sup>1</sup> The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

Docket Entry No. 2144 in Case No. 17-4780, the “Motion”).<sup>2</sup> The Motion concerns the *Joint Motion of Puerto Rico Electric Power Authority and AAFAF Pursuant to Bankruptcy Code Section 362, 502, 922, and 928, and Bankruptcy Rules 3012(A)(1) and 9019 for Order Approving Settlements Embodied in the Restructuring Support Agreement and Tolling Certain Limitations Periods* (Docket Entry No. 1235 in Case No. 17-4780, the “PREPA 9019 Motion”), filed by the Financial Oversight and Management Board for Puerto Rico (the “Oversight Board”), which seeks approval of the PREPA Restructuring Support Agreement (the “RSA”) and which has been repeatedly adjourned sine die. The Court has carefully reviewed and considered all of the parties’ submissions in connection with the Motion, and in connection with the *Status Report of the Government Parties Regarding the COVID-19 Pandemic and the 9019 Motion* (Docket Entry No. 14410).<sup>3</sup>

The gravamen of the instant Motion by the Official Committee of Unsecured Creditors (the “UCC”) is that the RSA on which the PREPA 9019 Motion is premised is now defunct and is being renegotiated by the parties to it. (Mot. ¶¶ 1-4, 16-18.) From that premise, the UCC concludes that the Court lacks jurisdiction of the pending PREPA 9019 Motion on the bases of mootness and ripeness, arguing that no case or controversy can exist regarding the

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<sup>2</sup> All docket entry references herein are to entries in Case No. 17-3283, unless otherwise specified.

<sup>3</sup> *Statement of Fuel Line Lenders with Respect to Motion to Terminate Rule 9019 Motion* (Docket Entry No. 14145); *Limited Joinder of SREAEE to the Motion of Official Committee of Unsecured Creditors to Terminate Bankruptcy Rule 9019 Motion and Request to Continue the Proceedings of Adversary Proceeding No. 19-00405*. (Docket Entry No. 14146); *Joint Objection of PREPA and AAFAF to Motion of Official Committee of Unsecured Creditors to Terminate Bankruptcy Rule 9019 Motion* (Docket Entry No. 14148, the “Government Objection”); *Official Committee of Unsecured Creditors’ Reply in Support of Motion to Terminate Rule 9019 Motion* (Docket Entry No. 14197, the “Reply”); *Official Committee of Unsecured Creditors’ Supplemental Brief Regarding Status Report of Government Parties* (Docket Entry No. 14447); *Government Parties’ Supplemental Response to Official Committee of Unsecured Creditors’ Supplemental Brief Regarding Status Report of Government Parties* (Docket Entry No. 14525).



PREPA 9019 Motion where the underlying RSA no longer exists, and where the prospects of a renegotiated RSA are undetermined. (Mot. ¶¶ 4, 14-16, 19-21.) The UCC notes that the Oversight Board has not even proposed a new hearing date for the PREPA 9019 Motion, thereby postponing resolution of the PREPA 9019 Motion indefinitely. (Mot. ¶¶ 7-12; Reply ¶ 10). The UCC argues alternatively that, in the event this Court has subject matter jurisdiction of the PREPA 9019 Motion, the Court should exercise its discretionary docket management powers to terminate the PREPA 9019 Motion without prejudice, as failure to do so enables the Oversight Board to control the claims objection process in a manner that exceeds the intent of Congress. (Mot. ¶¶ 5, 22-25, 30-31.)

The Court rejects the underlying premise of the UCC's Motion, and finds it inappropriate to pronounce dead what the parties to the RSA have not themselves terminated or rejected. Accordingly, the Court has jurisdiction of this Motion under section 306(a) of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2166(a).

The Court has discretionary power to manage its docket and courtroom in an efficient manner. Having considered whether to exercise that power to terminate the PREPA 9019 Motion, the Court declines to disrupt it since the parties continue to consider the underlying agreement and potential modifications to it, and the underlying RSA has not been terminated. (See, e.g., Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (identifying every court's inherent authority "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.")) Nor is the UCC currently prejudiced by the continued adjournment of the PREPA 9019 Motion, which will not persist indefinitely, as "the 9019 Motion will proceed in its current form or as amended, or it will be withdrawn." (Gov. Obj. ¶ 5.)

If the PREPA 9019 Motion goes forward, with or without amendments, the UCC's issues with respect to the propriety of the settlement of the secured status claims of the bondholders can be raised in connection with the Court's consideration of the proposed settlement. If the PREPA 9019 Motion is ultimately withdrawn and the Oversight Board continues to oppose litigation of an objection to the secured status claims, the Court will have the opportunity to consider the question of whether such litigation may go forward. Thus, under any outcome, the adjournments will not have compromised any rights of the UCC. By contrast, however, the prejudice that the Commonwealth would suffer by having claim objections intrude upon the negotiation process would be great, as it would undermine the existing consensual process contemplated by parties to the RSA with costly, time-consuming, and multifarious litigation. The Motion is therefore denied, without prejudice to renewal after April 21, 2021. This Order resolves Docket Entry No. 14056 in Case No. 17-3283 and Docket Entry No. 2144 in Case No. 17-4780.

SO ORDERED.

Dated: November 4, 2020

/s/ Laura Taylor Swain  
LAURA TAYLOR SWAIN  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

In re:  THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,  as representative of  THE COMMONWEALTH OF PUERTO RICO, <u>et al.</u> ,  Debtors. <sup>1</sup>	PROMESA Title III  Case No. 17 BK 3283-LTS  (Jointly Administered)
In re:  THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,  as representative of  PUERTO RICO ELECTRIC POWER AUTHORITY,  Debtor.	PROMESA Title III  Case No. 17 BK 4780-LTS

MEMORANDUM ORDER REGARDING OFFICIAL COMMITTEE OF UNSECURED CREDITORS' URGENT  
OBJECTION TO MAGISTRATE JUDGE'S SEPTEMBER 5, 2020 ORDER ON MOTION TO COMPEL  
DISCOVERY IN CONNECTION WITH MOTION TO TERMINATE BANKRUPTCY RULE 9019 MOTION

Before the Court is the *Official Committee of Unsecured Creditors' Urgent*

*Objection to Magistrate Judge's September 5, 2020 Order on Motion to Compel Discovery in*

<sup>1</sup> The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

*Connection with Motion to Terminate Bankruptcy Rule 9019 Motion* (Docket Entry No. 14210 in Case No. 17-3283<sup>2</sup> and Docket Entry No. 2184 in Case No. 17-4780, the “Objection”), filed by the Official Committee of Unsecured Creditors (the “Committee”).

The Committee objects to the ruling of Magistrate Judge Judith Gail Dein memorialized in the September 5, 2020, *Order on Motion to Compel* (Docket Entry No. 14181, the “Order”), which pertains to discovery sought by the Committee in connection with the *Motion of Official Committee of Unsecured Creditors to Terminate Bankruptcy Rule 9019 Motion* (Docket Entry No. 14056, the “Termination Motion”) and opposed by the Financial Oversight and Management Board for Puerto Rico (the “Oversight Board”), as representative of PREPA in these Title III cases pursuant to Section 315(b) of the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”),<sup>3</sup> the Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF,” and collectively with PREPA and the Oversight Board, the “Government Parties”), Citigroup Global Markets Inc., Ankura Consulting Group, LLC, David Skeel, and Jose Ortiz. The Court has reviewed carefully the parties’ submissions<sup>4</sup> and, for the reasons that follow, the Objection is overruled and the Order stands.

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<sup>2</sup> All docket entry references are to entries in Case No. 17-3283, unless otherwise specified.

<sup>3</sup> PROMESA is codified at 48 U.S.C. §§ 2101-2241.

<sup>4</sup> The Court has considered the Objection, *Respondents’ Opposition to UCC’s Urgent Objection to Magistrate Judge’s September 5, 2020 Order on Motion to Compel Discovery in Connection with Motion to Terminate Bankruptcy Rule 9019* (Docket Entry No. 14346, the “Response”), and the *Official Committee of Unsecured Creditors Reply in Support of Urgent Objection to Magistrate Judge’s September 5, 2020 Order on Motion to Compel Discovery in Connection with Motion to Terminate Bankruptcy Rule 9019 Motion* (Docket Entry No. 14409, the “Reply”).

I.

BACKGROUND

On August 18, 2020, the Committee filed the Termination Motion, seeking entry of an order dismissing or terminating the *Joint Motion of Puerto Rico Electric Power Authority and AAFAF Pursuant to Bankruptcy Code Sections 362, 502, 922, and 928, and Bankruptcy Rules 3012(a)(1) and 9019 for Order Approving Settlements Embodied in the Restructuring Support Agreement and Tolling Certain Limitations Periods* (Docket Entry No. 1235 in Case No 17-4780, the “9019 Motion”) on the basis that “all available evidence demonstrates that (i) the [Definitive Restructuring Support Agreement dated as of May 19, 2019 (the “RSA”)]—which forms the sole basis for the case or controversy underlying the relief requested in the 9019 Motion—no longer exists as a viable agreement and (ii) the Government Parties have no intention of moving forward with their motion seeking approval of this RSA.” (Termination Mot. ¶ 2.) In support of the Termination Motion, the Committee cited several statements by government representatives that, the Committee argues, constitute “overwhelming publicly-available evidence that the RSA is already no longer viable in its current form.” (Termination Mot. ¶ 17.)

On August 28, 2020, the Committee filed the *Official Committee of Unsecured Creditors’ Urgent Motion to Compel Discovery in Connection with Motion to Terminate Bankruptcy Rule 9019 Motion* (Docket Entry No. 14127, the “Motion to Compel”), pursuant to which the Committee sought to compel the Government Parties to comply with document requests and deposition notices concerning the viability of the RSA and the extent to which the parties may renegotiate the RSA. The Committee argued that its discovery requests are relevant to determining “whether or not the Government Parties have already decided that (i) the current

RSA is no longer viable and needs to be renegotiated, and (ii) therefore, they do not intend to prosecute the 9019 Motion to seek approval of the current RSA.” (Mot. to Compel ¶ 1.)

Following the briefing of the Motion to Compel, Judge Dein issued the Order denying the Motion.

## II.

### DISCUSSION

Upon review of a timely objection to a non-dispositive order issued by a magistrate judge, the district judge to whom the case is assigned must consider the objection and modify or set aside any part of the order that “is clearly erroneous or contrary to law.” 28 U.S.C.A. § 636(b)(1)(A) (Westlaw through P.L. 116-158); see also Fed. R. Civ. P. 72(a). Under the “clearly erroneous” standard, the reviewing court “must accept both the trier’s findings of fact and the conclusions drawn therefrom unless, after scrutinizing the entire record, [it] form[s] a strong, unyielding belief that a mistake has been made.” Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 4 (1st Cir. 1999) (citation and internal quotation marks omitted). A magistrate judge’s rulings will be reviewed under the “contrary to law” standard when the motion “turns on a pure question of law.” PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 15 (1st Cir. 2010). “This means that, for questions of law, there is no practical difference between review under Rule 72(a)’s ‘contrary to law’ standard and review under Rule 72(b)’s de novo standard.” Id. Mixed questions of law and fact trigger a sliding scale of review pursuant to which

[t]he more fact intensive the question, the more deferential the level of review (though never more deferential than the ‘clear error’ standard); the more law intensive the question, the less deferential the level of review.

Goat Island S. Condo. Ass’n, Inc. v. IDC Clambakes, Inc. (In re IDC Clambakes, Inc.), 727 F.3d 58, 64 (1st Cir. 2013) (citation omitted).<sup>5</sup>

Rule 26 of the Federal Rules of Civil Procedure, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 9014(c) and 7026, provides that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1).

The Committee argues in its Objection that Judge Dein erred in applying this standard by (i) focusing unduly on the question of whether the Government Parties have formally abandoned the RSA instead of the question of whether the Government Parties have determined that the RSA is substantively defunct (Obj. ¶ 16), (ii) misconstruing the Committee’s discovery requests as seeking the mere opinions of PREPA and Oversight Board officials rather than “evidence of an actual determination that the Rule 9019 Motion will not be pursued at this time because the RSA—even if it has not technically been terminated—is no longer viable . . .” (Obj. ¶¶ 17-18), and (iii) concluding that sufficient information already exists for the Committee to prosecute the Termination Motion. (Obj. ¶¶ 19-20.)

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<sup>5</sup> Although the Committee identifies the appropriate standard of review, it incorrectly asserts that Judge Dein’s ruling is “founded upon questions of law meriting de novo review under a ‘contrary to law’ standard.” (Motion ¶ 14.) Judge Dein’s determinations instead turn upon questions of fact in varying degrees, and this Court has applied the foregoing standard in evaluating her ruling accordingly.

The Committee has not demonstrated that the Order was either clearly erroneous or contrary to law. The Committee does not dispute that formal termination of the RSA would require either expiration by the agreement's own terms or issuance of a formal resolution, and that neither of those events has occurred. (Obj. ¶ 16.) Thus, as Judge Dein recognized, the discovery sought by the Committee would "not address the critical question of whether the Government Parties have abandoned the RSA." (Ord. at 5.) The Committee contends that, notwithstanding the continued formal existence of the RSA, discovery may unearth evidence that the Government Parties have already decided that the RSA is a dead letter. (Obj. ¶¶ 17, 20.) However, the RSA exists until it is formally terminated and, although the Government Parties' internal deliberations and evaluations might be probative of the ultimate viability of the RSA—or may provide ammunition for opponents of the 9019 Motion—they do not finally determine the fate of the RSA until a formal decision is made. Before that formal decision, officials might change their views, RSA counterparties may alter their positions, or the feasibility of the RSA might be affected by changing economic or political circumstances. Judge Dein reasonably concluded that, absent a final decision, individuals' evaluations of the feasibility of the RSA are of minimal likely benefit and are outweighed by the burden of the proposed discovery. (Ord. at 5-6.)

That calculus is further buttressed by the availability of status reports from the Government Parties acknowledging the ongoing evaluation of the RSAs and setting forth considerations that have informed the Government Parties' decisionmaking. (Ord. at 5; see, e.g., Status Report of the Government Parties Regarding the Covid-19 Pandemic and the 9019 Motion, Docket Entry No. 2111 in Case No. 17-4780 at ¶ 25.) The Committee can present its arguments concerning the viability of the RSA and the wisdom of further adjournments of the



9019 Motion through facts that are part of the public record, including the number of adjournments that the Government Parties have requested, the justifications and estimated timelines (or any absence thereof) provided by the Government Parties for such extensions, and the acknowledgments by the Government Parties that the feasibility of the RSA is actively under consideration and subject to continued diligence. (Ord. at 5-6.) The Committee does not need discovery concerning ongoing negotiations and deliberations to present its argument that the Government Parties effectively have abandoned the RSA.

### III.

#### CONCLUSION

Having determined that the Order was neither clearly erroneous nor contrary to law, the Court finds it unnecessary to address the arguments proffered by the parties concerning whether the materials requested by the Committee are protected by the work-product, attorney-client, or deliberative process privileges. Accordingly, the Objection is overruled and Judge Dein's Order stands.

This Memorandum Order resolves Docket Entry No. 14210 in Case No. 17-3283 and Docket Entry No. 2184 in Case No. 17-4780.

SO ORDERED

Dated: October 15, 2020

/s/ Laura Taylor Swain  
LAURA TAYLOR SWAIN  
United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

In re:

The Financial Oversight and Management Board for  
Puerto Rico,

as representative of

The Commonwealth of Puerto Rico, *et al.*,

Debtors<sup>1</sup>.

PROMESA

Title III

No. 17 BK 3283-LTS

In re:

The Financial Oversight and Management Board for

Puerto Rico,

as representative of

The Puerto Rico Electric Power Authority,

Debtor.

PROMESA

Title III

No. 17 BK 4780-LTS

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<sup>1</sup> The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (the "Commonwealth") (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

## **ORDER ON MOTION TO COMPEL**

### **I. INTRODUCTION**

This matter is before the Court on the *Official Committee of Unsecured Creditors' Urgent Motion to Compel Discovery in Connection with Motion to Terminate Bankruptcy Rule 9019 Motion* (Dkt. No. 14127 in 17-BK-3283 and Dkt. No. 2155 in 17-BK-4780<sup>2</sup>) (the “Motion to Compel”). The Court has also received and reviewed the Government Parties’<sup>3</sup> Opposition (Dkt. No. 2164) (the “Opposition”), and the UCC’s Reply (Dkt. No. 2173) (the “Reply”). Through the Motion to Compel, the UCC seeks discovery in connection with its *Motion to Terminate Bankruptcy Rule 9019 Motion* (Dkt. No. 2144) (the “Motion to Dismiss”). After careful review of the parties’ submissions, and for the reasons addressed herein, the Court hereby DENIES the Motion to Compel.

### **II. BACKGROUND**

The Motion to Dismiss seeks an order dismissing PREPA’s 9019 Motion because, according to the UCC, “the Government Parties no longer support the underlying RSA, and therefore the Court lacks subject matter jurisdiction over the dispute.” Motion to Compel ¶ 1. The UCC asserts that “recent public statements from leaders of the Oversight Board and PREPA in which they explain that the RSA must be renegotiated and that such renegotiations are unlikely to begin until sometime in 2021” is evidence that the Government Parties have already decided to abandon the RSA in its current form and to not prosecute the 9019 Motion. *Id.* In particular, the UCC points to the statements of PREPA’s former executive director, Jose Ortiz,

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<sup>2</sup> Unless otherwise specified, all docket numbers referenced herein shall refer to docket numbers in Case Number 17-BK-4780.

<sup>3</sup> Capitalized terms not defined herein shall have the meanings given to them in the Motion to Compel.

made “publicly during a high-profile industry conference last month that the RSA ‘certainly has to be renegotiated,’ but that he **“do[es]n’t see an RSA being agreed on until next year.”**”

Motion to Dismiss ¶ 3 (emphasis in original). The UCC also relies on a statement from PREPA governing board member Robert Poe that the “‘RSA that was considered last year [is] a whole different situation’ given that interest rates have now plummeted such that ‘money is almost free at this point.’” Motion to Compel ¶ 18. The UCC argues that its Motion to Dismiss thus places the factual issues of “whether or not the Government parties have already decided that (i) the current RSA is no longer viable and needs to be renegotiated, and (ii) therefore, they do not intend to prosecute the 9019 Motion to seek approval of the current RSA” at issue, and the UCC is entitled to discovery concerning these facts. Id. ¶ 1. The UCC has agreed to narrow its discovery requests to one document request and two three-hour depositions. See id. ¶ 5. The document request seeks documents and communications, dated from June 1, 2020 through the present, “relating to the status of the RSA and/or the 9019 Motion, including without limitation documents relating to the status of the RSA and/or the 9019 Motion (including any adjournment of the 9019 Motion), whether the RSA remains viable in its current form, and/or whether the RSA may be renegotiated by the parties,” from the following four custodians: Jose Ortiz, David Skeel, Natalie Jaresko, and David Brownstein of Citi. Motion to Compel, Ex. 1, Document Request No. 1. The UCC also agreed to forego Rule 30(b)(6) depositions of PREPA and the Oversight Board and seeks to depose only Jose Ortiz and David Skeel. See Motion to Compel ¶ 5.

The Government Parties, however, represent that no decision has been made to abandon the RSA, and that they are continuing to evaluate the feasibility of the RSA in light of

the COVID-19 pandemic. See Opposition ¶ 9. Per the District Court’s August 5, 2020 Order, the Government Parties will “provid[e] an update on PREPA’s financial condition and propos[e] next steps with respect to the 9019 Motion” on September 25, 2020. See id. (quoting Dkt. No. 2120). They contend that the UCC is not entitled to any discovery because the UCC’s requests for documents and communications concerning the Government Parties’ ongoing evaluation of the RSA are overwhelmingly privileged, and the requests are irrelevant and disproportionate to the needs of the UCC’s motion. See id.

### III. ANALYSIS

#### A. Relevance

Federal Rule of Civil Procedure 26 provides that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case . . . .” The issues raised in the Motion to Dismiss are whether the Government Parties have decided to abandon the RSA and whether they have made a determination to not prosecute the 9019 Motion. See Motion to Dismiss ¶ 4 (“The dispositive question is whether the Government Parties are going forward with their motion, the answer to which clearly is – and has been for a long time – a resounding ‘no.’”). The impetus for the UCC’s Motion to Dismiss appears to be public statements made by certain government officials, expressing their opinions that the RSA may need to be renegotiated. See Motion to Compel ¶¶ 1, 18. The UCC claims that these statements are evidence that “PREPA and the Oversight Board know the RSA has to change.” Id. ¶ 18. The Government responds

that “[o]ne-off statements of individuals about the viability of the RSA do not change [the] basic fact” that “absent formal termination, the RSA remains effective.” This Court agrees.

Individuals’ opinions are of minimal probative value as to whether the Government Parties have made a decision to abandon the RSA or not prosecute the 9019 Motion. The UCC does not allege that the RSA expired by its own terms. Opposition ¶ 4. The UCC also does not dispute the fact that contractual termination of the RSA can only be achieved by resolution, and no such resolution has been made. Id. As the Government Parties assert, “the RSA’s status is not a matter of opinion or a subject of inquiry, it is an objective fact and, by its terms, the RSA remains in effect unless and until a termination right is exercised.” *Joint Objection of PREPA and AAFAF to Motion of Official Committee of Unsecured Creditors to Terminate Bankruptcy Rule 9019 Motion* (Dkt. No. 2160) ¶ 3. Thus, the discovery being sought by the UCC will not address the critical question of whether the Government Parties have abandoned the RSA.

To the extent that the UCC’s argument in connection with its Motion to Dismiss is premised on an implied abandonment or termination of the RSA, there is sufficient information in the record already to enable the UCC to present the argument to the Court. Additional discovery will not alter the number of extensions that have been sought by the Government Parties to date. Nor will it alter the content of the status reports filed by the Government Parties describing a time-line (or, as the UCC contends, the absence of a time-line) for the Government Parties to request a hearing on the RSA. Similarly, in the status reports the Government Parties acknowledge that they are still evaluating the viability of the RSA and that they may not be presenting it to the Court for hearing in its present form. There are sufficient official statements by the Government Parties to squarely present the UCC’s legal arguments to

the Court. In sum, this Court finds that even the UCC's narrowed discovery requests are disproportionate given the minimal relevance of the information it seeks to the Motion to Dismiss.

B. Privilege

While this Court believes that much of the communications requested by the UCC may be protected from disclosure by the attorney-client privilege, the work product privilege, and/or the deliberative process privilege, this Court declines to address those arguments in light of the conclusion that the discovery requests are disproportionate to the needs of the case given their minimal relevance to the Motion to Dismiss.

IV. CONCLUSION

For the reasons detailed herein, the Motion to Compel is DENIED.

This Order resolves Dkt. No. 14127 in 17-BK-3283 and Dkt. No. 2155 in 17-BK-4780.

SO ORDERED.

Dated: September 5, 2020

/s/ Judith Gail Dein  
HONORABLE JUDITH GAIL DEIN  
UNITED STATES MAGISTRATE JUDGE